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No. _____

In The

Supreme Court of the United States

PRENKA IVEZAJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Terms like "crime of violence" or "violent felony" are used in many federal statutes, and generally portend onerous consequences for someone. In *Taylor v. United States,* 495 U.S. 575 (1990), this Court attempted to bring uniformity to the lower federal courts' understanding of those portentous terms by mandating a "categorical" approach for determining whether a crime of "violence" has been committed. This Court's efforts have proven unsuccessful. A severe split exists among the circuits as to whether and which sources outside the statute can be used to determine if a "crime of violence" was committed.

Similar confusion reigns as to whether and when the federal courts of appeals should certify a new question of state law, with serious federalism and due process implications, particularly when the new state law question arises in the context of a federal criminal prosecution, as it did here.

1. Consistent with this Court's "categorical" approach, can RICO, a violence-neutral statute, be deemed "a crime of violence" within the meaning of 18 U.S.C. §924(c) by resort to the language of the charging instrument or the proof?

2. Consistent with fundamental principles of federalism and the Due Process Clause, shouldn't the lower federal courts certify to the state courts an important new question of state law on which a defendant's guilt of a serious federal crime depends?

PARTIES TO THE PROCEEDING

Petitioner Prenka Ivezaj was tried on a superseding indictment which charged him and five codefendants, i.e., Alex Rudaj, Nardino Colotti, Nikola Dedaj, Ljusa Nuculovic and Angelo DiPietro. All of the defendants appealed to the Second Circuit and their convictions were all simultaneously affirmed. Only codefendants Rudaj, Colotti, Dedaj, and Nuculovic are filing petitions for certiorari. All of the defendants have an interest in the issues raised by this petition, and Ivezaj has an interest in some of the anticipated petitions of his codefendants.

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OPINIONS BELOW

The decision of the Court of Appeals affirming Ivezaj's judgment of conviction and rejecting the arguments raised by this petition is reported as *United States v. Ivezaj*, 568 F.3d 88 (2d Cir. 2009) (Feinberg, Miner and B.D. Parker, *Circuit Judges*). Appendix A.

The Court of Appeals simultaneously decided other issues, principally those raised by Ivezaj's co-appellants, by summary opinion reported as *United States v. Ivezaj*, 336 Fed. Appx. 6 (2d Cir. June 11, 2009). Appendix B.

In an unreported order dated August 31, 2009 (Appendix C), the Court of Appeals denied Ivezaj's petition for rehearing with a suggestion for rehearing *en banc*.

JURISDICTION

The judgment of the Court of Appeals which petitioner Ivezaj asks this Court to review was entered on June 11, 2009, and the order of that court denying Ivezaj's petition for rehearing was entered on August 31, 2009. On October 14 and December 16, 2009, Justice Ginsburg extended Ivezaj's time within which to file a petition for a writ of certiorari until January 28, 2010. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1962(c) provides:

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. §1961(1) defines "racketeering activity" in relevant part as:

"(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter or dealing in a controlled substance or listed chemical (as defined in section 102 of the Control Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year."

18 U.S.C. §924(c)(1)(A) provides:

"Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of

any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years."

18 U.S.C. §924(c)(3) provides:

"For purposes of this subsection the term 'crime of violence' means an offense that is a felony and – (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

New York Penal Law §155.00(1) defines "property" to "mean[]":

"any money, personal property, real property, computer data, computer program, thing in action, evidence of debt or contract, or any article, substance or thing of value, including any gas, steam, water or electricity, which is provided for a charge or compensation."

New York Penal Law §155.00(2) defines "obtain" for purposes of New York's larceny and extortion statutes as:

"includ[ing], but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another."

New York Penal Law §155.00(5) defines in relevant part the term "owner" for purposes of New York's larceny statute as follows:

"When property is taken, obtained or withheld by one person from another person, an 'owner' thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder."

New York Penal Law §155.05, defines larceny in relevant part as follows:

"1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

* * *

(e) By extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will: (i) Cause physical injury to some person in the future; or (ii) Cause damage to property . . . "

STATEMENT

1. Introduction. In 2001, a group of largely ethnic Albanians later identified in a federal indictment as the "Rudaj Organization" after the group's alleged leader, attempted to expand the Organization's control over illegal gambling from parts of the Bronx and Westchester Counties in New York, to the Astoria neighborhood of Queens County, New York, where the Lucchese organized crime family had previously held sway. Although the indictment alleged that the Rudaj Organization had been around since the early 1990's, Iveza[illegible], a 40-year-old U.S. citizen with no prior criminal record, did not become a member until the summer of 2001, and even then was only a salaried employee of the Organization.

The Rudaj Organization's takeover of illegal gambling in Astoria was successful, at least until the government began to investigate the Organization in the summer of 2001 after a gambler named Balampanis complained to the authorities that he had been beaten by members of the Organization –

although confronted with Ivezaj at trial, Balampanis insisted that "I didn't see this guy there" at his beating – culminating in a raid on the Organization's gambling establishments in October 2004, the seizure of its gambling machines and records, and the arrest and indictment of 22 members or associates of the Organization. Ivezaj and the five codefendants with whom he would later be tried were detained.

2. The Indictment. As submitted to the jury, Counts One and Two of the redacted indictment charged Ivezaj with RICO and RICO conspiracy based on five alleged acts of racketeering: 1) operation and promotion of illegal gambling in violation of New York law (Act One): 2) conspiracy and attempted extortion and extortion, committed on June 16, 2001, against Balampanis and his friend Dimopoulos (said to be the Luccheses' agent for controlling illegal gambling in Astoria), in violation of New York's extortion statute (Act Four); 3) similar extortionate conduct, in violation of New York law, committed in August 2001 against a new and competing gambling club named Soccer Fever and a gambler named Hirakis (Act Five); 4) conspiracy and extortion directed against the owner of Calda's Bar in Mount Vernon, New York, in violation of the federal extortion statute (Act Eight); and 5) conspiracy and extortion committed in October 2004 against the owner of Cosmo's Bar in Astoria, in violation of the federal extortion statute (Act 12).

Of the five racketeering acts in which Ivezaj was named, only Racketeering Acts Four and Five involved the display of firearms. The substantive gambling

and extortion offenses with which Ivezaj was charged did not involve weapons.

Finally, Count 13 charged Ivezaj and his co-defendants with brandishing a firearm in furtherance of "a crime of violence," in violation of 18 U.S.C. §924(c)(1)(A)(ii), which required, upon conviction, a minimum seven-year prison term consecutive to any other term imposed. While the district court found that RICO alone did not meet §924(c)(3)'s definition of a "crime of violence" (CIA178),[1] it nevertheless ruled prior to trial and told the jury over objection that they could find Ivezaj's guilt on the weapons count on the basis of Racketeering Acts Four or Five charging state law extortion offenses.

3. The Trial. At Ivezaj's three-month trial, the defendants conceded their membership in an illegal gambling enterprise. Thus, the heart of the government's case against Ivezaj was his charged extortionate conduct, principally alleged in Racketeering Acts Four and Five since only those predicates could be the basis for Ivezaj's conviction on the firearms offense charged in Count 13. It was the government's novel theory in Racketeering Acts Four and Five that, under New York's extortion statute, the "property" the Organization conspired or attempted to extort or extorted was control over illegal gambling

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[1] "CIA" refers to the joint appendix filed in the Court of Appeals by codefendant Colotti and Ivezaj; "T." refers to pagination in the transcript of the trial in the district court.

in Astoria from the Lucchese crime family (Act Four) or from the owners of Soccer Fever, a new and competing gambling club in Astoria (Act Five).

A. Racketeering Act Four. It was the government's theory that the beating of Balampanis alleged in Racketeering Act Four was the Organization's public announcement that it had "arrived" and now controlled gambling in Astoria. T. 9857. Balampanis himself was only a gambler in the dice game at the establishment in Astoria underlying the racketeering act, but he was Dimopoulos's friend, and Dimopoulos was believed to control gambling in Astoria for the Luccheses. CIA259-61. The Organization had apparently attempted to convince Dimopoulos to switch his allegiance from the Luccheses Family and run gambling in Astoria for the Organization; when Dimopoulos declined the offer, he was warned by the Organization to stay out of Astoria. CIA343a-d.

According to Balampanis, on the night in question, he was lured by a codefendant (Nuculovic) into the foyer of a gambling club above a Greek restaurant in Astoria where Balampanis had been gambling just before his beating. In the foyer, Nuculovic threw a punch but missed, then pulled a gun; others piled into the small space and began pummeling and kicking Balampanis. Balampanis was treated at a hospital that night, mostly for cuts and bruises, and discharged the same day. Despite Ivezaj's imposing height (6'5"), Balampanis appeared to rule out Ivezaj as one of his assailants: "I didn't see this guy there." CIA269. Moreover, during Rudaj's blow-by-blow

account of the beating of Balampanis, secretly recorded by a cooperating witness (Nicos Kyprianou), Rudaj omitted Ivezaj from a long list of persons he identified as having participated in the beating of Balampanis. CIA788.

The only evidence that Ivezaj was present at Balampanis's beating came from one Sanginiti, who had pleaded guilty and was facing a long prison term. According to Sanginiti, he was hanging out one night with Ivezaj and codefendant DiPietro at a gambling club in Port Chester, New York, when one of them received a phone call telling them that they were needed in Queens. Sanginiti went along for the ride, waited in the car while DiPietro and Ivezaj disappeared into a building somewhere in Astoria, reemerging from the building 15-20 minutes later accompanied by Rudaj who was complaining about getting blood on his pants. On the ride back to Port Chester, Ivezaj described how Rudaj was "crazy" and had "hit him with the barrel of the gun and split the guy's face open," and that DiPietro had kicked someone "pretty good." CIA2112-14. The government argued that Sanginiti's testimony referred to the beating of Balampanis, although Sanginiti did not witness the event nor could he identify the date beyond stating that it was the summer of 2001 or 2002.

When Balampanis asked Dimopoulos soon after the beating to explain why he was beaten, Dimopoulos supposedly told Balampanis: "[T]hey didn't find me there, so they beat you up so they can send a

message to me." CIA263-64. Dimopoulos did not return to Astoria after the beating. CIA264.

B. Racketeering Act Five. In August 2001, Tommy Napoli, a Gambino member (T. 4677), started a competing dice game at Soccer Fever in Astoria without obtaining the Organization's permission. On the second night of the game, members of the Organization, including Ivezaj, forcibly closed down the new club, breaking the dice table and beating Hirakis, a gambler who had become a "partner" in the dice game because he mistakenly believed that Napoli had obtained the Organization's permission to open. T. 4586-4612. Hirakis insisted that each of the defendants, including Ivezaj, displayed a gun. T. 4596-97, 4599.[2] As Hirakis tried to leave the premises, Ivezaj grabbed him by the throat and lifted him up, and other defendants began punching him in his face and stomach, causing him to lose consciousness (T. 4601-06), although Hirakis did not go to the hospital but was treated by a private doctor. T. 4610-12.

After Hirakis decided to cooperate with the government, he secretly recorded a conversation with Ivezaj in which he asked Ivezaj what would have happened if the security personnel at Soccer Fever had pulled guns themselves on the night the Organization closed down the club, to which Ivezaj responded, "Everybody dies, guaranteed. Nobody

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[2] All defendants were acquitted of assaulting Hirakis in aid of racketeering, as charged in Count Four. T. 10,138.

walks out of there alive, either them or us." CIA728; T. 4954.

4. Rule 29 Motions and Verdict. The defense moved unsuccessfully at the end of the government's case to dismiss or strike Racketeering Acts Four and Five on the ground, *inter alia*, that control over an illegal gambling enterprise, e.g., the Luccheses' control over gambling in Astoria and Napoli's control over Soccer Fever, was not "property" within the meaning of New York's extortion statute. The defense also moved unsuccessfully, both pretrial and during their Rule 29 motion at the close of the government's case, to dismiss the weapons count (Count 13) on the ground that RICO is not a crime of violence within the meaning of 18 U.S.C. §924(c)(1)(A) and (c)(3).

After extended deliberations, the jury returned with their verdict on January 4, 2006, convicting Ivezaj of, *inter alia*, RICO and RICO conspiracy (Counts One and Two) and the weapons offense (Count 13), and found Racketeering Acts Four and Five proven as to him. CIA701-10. In June 2006, the district court sentenced Ivezaj to a 22-year prison term, seven years of which was attributable to his conviction on Count 13. His five codefendants, all of whom were convicted, received more severe sentences.

5. Appeal. The Court of Appeals affirmed. App. A. It rejected Ivezaj's argument that, under this Court's "categorical" approach announced in *Taylor v.*

United States, 495 U.S. 575, 600 (1990), and reaffirmed in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), RICO is not by its nature or on its face a "crime of violence," nor are state court predicates like the ones charged in this case "prosecut[able] in a court of the United States," within the meaning of 18 U.S.C. §924(c)(1)(A) and (c)(3), and therefore Ivezaj's conviction on Count 13 must be reversed. In the view of the Court of Appeals, since the nature of RICO for purposes of §924(c) "hinge[s] on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a 'crime of violence' is charged." App. A at 16. "[W]here the government *proves* (1) the commission of at least two acts of racketeering, and (2) at least two of those acts qualify as 'crime[s] of violence' under §924(c), a [RICO] conviction serves as a predicate for a conviction under §924(c)." *Id.* at App. 16 (emphasis added).

Ivezaj also argued in the Court of Appeals that whether control over an illegal enterprise like gambling is "property" within the meaning of New York's extortion statute is an entirely new issue of state law which should be certified to the New York Court of Appeals. The Court of Appeals rejected Ivezaj's argument on the ground that "illegal intangible property, such as that contemplated here, fits within [New York's] expansive definition of [property]." App. A at 8. In the view of the Court of Appeals, "we see no indication that the New York legislature intended that illegal intangible assets cannot be the subject of

extortion." App. A at 9-10. Ivezaj's motion for reargument, in which he, *inter alia,* urged the Court of Appeals to certify to the New York Court of Appeals the new question of state law on which Racketeering Acts Four and Five and Count 13 turned, was denied.

REASONS FOR GRANTING THE WRIT

I. RICO Is Not A Crime Of Violence Under The "Categorical" Approach, And Therefore Cannot Be A Predicate For A Firearm Conviction Under 18 U.S.C. §924(c)

1. In *Taylor v. United States*, 495 U.S. 575 (1990), this Court mandated a "categorical" approach for determining the meaning of the term "violent felony" as used in the Armed Career Criminal Act, 18 U.S.C. §924(e). As used in *Taylor*, "categorical" meant that a "crime of violence" or "violent felony" would be measured solely by examining the elements of the crime at issue, and not the facts underlying the conviction, whether alleged in the indictment, reflected in jury instructions or proven at trial. *Id.* at 600. *Taylor* recognized an exception to the categorical approach only in a "narrow range of cases" where a state's definition of one of the listed offenses in §924(e), e.g., burglary, is broader than the common law or generic definition of the crime, and encompasses non-violent conduct. *Id.* at 602. In such cases, the federal courts look to the charging instrument or jury instructions to determine if the party had been convicted of a crime of violence. Subsequent cases

have come to describe this "narrow" exception as the "modified categorical approach." *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

2. In the 20 years since *Taylor* was decided, this Court has never questioned the continued vitality of the "categorical approach" *See, e.g., James v. United States*, 550 U.S. 192, 202 (2007); *Shepard v. United States*, 544 U.S. 13, 17 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). Yet, the lower federal courts continue to struggle with the precise contours of and differences between the "categorical" and "modified categorical" approaches, producing division and conflict among the circuits. In holding in this case that RICO can be a "crime of violence" within the meaning of §924(c)(3) if the charge is based on racketeering acts alleging crimes of violence, the Second Circuit's decision squarely conflicts with at least two other circuits. *United States v. Fulford*, 267 F.3d 1241, 1249-51 (11th Cir. 2001) ("elements" test of categorical approach prohibits "look[ing] past the conviction to the charging document in determining whether defendant committed a "serious violent felony" within the meaning of 18 U.S.C. §3559, the federal "three strikes" law);[3]

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[3] *Fulford* was cited approvingly on this point by the *en banc* Fifth Circuit in *United States v. Calderon-Pena*, 383 F.3d 254, 258 n. 7 (5th Cir. 2004) (*en banc*). The Second Circuit, however, is not alone in holding that the "modified categorical approach," which can permit, under "narrow" circumstances, resort to the charging instrument to help determine the nature of the charged crime, may apply to an offense like §924(c). *See, e.g., United States v. Kennedy*, 133 F.3d 53, 56-57 (D.C. Cir. 1998).

Bush v. Pitzer, 133 F.3d 455, 457 (7th Cir. 1998) (18 U.S.C. §3621(e)(2)(B), which forbids early release when a defendant was convicted of a "violent offense" within the meaning of §924(c)(3), does not bar early release of defendant convicted only of conspiracy, even though it was a conspiracy to sell 400 guns to gang members, because conspiracy "does not by its 'nature' present a serious risk" of violence even if "Bush's conduct did so").[4]

In other words, had Ivezaj been prosecuted in the Seventh or Eleventh Circuits, he could not have been convicted of the §924(c)(1)(A) offense for which he now must serve an additional seven-year prison term because RICO by its "nature" or "elements" is a violence-neutral statute, i.e., it can be committed without committing crimes of violence. *See* 18 U.S.C. §1961(1) (permitting RICO conviction based on such non-violent RICO predicates as bribery or gambling under state or federal law, or mail/wire fraud or copyright infringement under federal law). Thus, this conflict among the circuits presents a classic case for certiorari under this Court's Rules. Rule 10(a), Rules of the Supreme Court of the United States.

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[4] Although *Bush* was not directly interpreting §924(c)(3), the lower federal courts in the Seventh Circuit have relied upon it to interpret the meaning of a "crime of violence" under §924(c)(3). *See United States v. Thornton*, 2009 WL 377979 at *4 (N.D. Ill. 2009) (conspiracy to commit bank robbery was not "crime of violence," noting that Eighth and Ninth Circuits disagree).

3. Contrary to the view of the Second Circuit in this case, the fact that RICO on its face permits conviction based on violent as well as non-violent racketeering act does not change the "categorical" analysis which forbids resort to the charging instrument to resolve any ambiguity as to whether the offense at issue is or is not a crime of violence, at least when the term "crime of violence" is defined by the statute, as it is in §924(c)(3) under which Ivezaj was convicted. In *Fulford*, the Eleventh Circuit held that a conviction for "aggravated assault" under a Florida statute was not a "serious violent felony" under the federal "three strikes" law, 18 U.S.C. §3559(c), because the Florida statute did not require use of a firearm to commit an "aggravated assault," although use of a firearm was one of the ways in which the offense could be committed, and it would have been improper for the federal court to resort to the charging document in the Florida case which alleged that the defendant had indeed used a firearm in the commission of the assault. In so holding, the Eleventh Circuit rejected the government's argument that the "modified categorical approach" authorized resort to the charging instrument to resolve the ambiguity as to what kind of aggravated assault the defendant had committed in Florida, i.e., with a firearm or without. In the Eleventh Circuit's view, the "modified categorical approach" was limited to statutes like §924(e), which does not require an "elements" test, unlike §924(c), which does. 267 F.3d at 1249-51. Under *Fulford's* analysis, the fact that RICO can be a violent or a non-violent crime does not permit resort to the

racketeering acts alleged in the indictment to determine its nature for purposes of 18 U.S.C. §924(c)(3).[5]

Here, the Second Circuit reasoned that, "because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged." The Second Circuit's rationale conflicts with *Fulford* and ultimately *Taylor* whose "narrow range of cases" in which the "modified categorical approach" could be used does not include §924(c), the statute at issue in this case.

4. The Second Circuit's decision in this case also conflicts with the Seventh Circuit's decision in *Bush v. Pitzer*, in which Judge Easterbrook held that offenses like conspiracy are violence-neutral under an elements or "by its nature" test. In *Bush*, the Seventh Circuit's analysis under §3621(e)(2)(B) disregarded the fact that the object of the defendant's conspiracy was to sell firearms to hundreds of gang members, because the focus of §924(c)(3) is on the elements or nature of conspiracy which does not necessarily require or contemplate violence. Here, by contrast, the Second Circuit was unjustifiably influenced by the nature of the predicate racketeering acts, finding support for its reasoning in conspiracy law: "This

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[5] The federal courts agree that the term "by its nature" as used in statutes like §924(c)(3) refers to the "nature" of the elements of the offense and not to the "nature" of the conduct. *United States v. Dillard*, 214 F.3d 88, 92 (2d Cir. 2000); *United States v. Singleton*, 182 F.3d 7, 12 (D.C. Cir. 1999).

conclusion [that the racketeering acts alleged in the indictment could be used to determine the nature of RICO for purposes of §924(c)(3)] aligns neatly with our case law that a RICO conspiracy can constitute a 'crime of violence' under statutes that provide virtually identical definitions of that term to the definition provided in §924(c)." App. A at 16 n. 4. The Second Circuit's reliance on conspiracy law puts it at odds with the Seventh Circuit.

5. Moreover, even among circuits that invoke the modified categorical approach, none of them approve what the Second Circuit did here, i.e., looking to the facts proven at trial, and not simply the allegations concerning the racketeering acts alleged in the indictment. App. A at 16 (emphasis added) ("Applying this reasoning, we hold that where the government *proves* (1) the commission of at least two acts of racketeering, and (2) at least two of those acts qualify as 'crime[s] of violence' under §924(c), a [RICO] conviction serves as a predicate for a conviction under §924(c)"). Even if the Second Circuit was permitted to look to Racketeering Acts Four and Five, the only predicate acts which could even arguably support the firearm offense for which Ivezaj was convicted, those predicate acts did not describe a crime of violence beyond alleging violations of New York's extortion statute which punishes both violent and non-violent

conduct.[6] Thus, unless all extortion offenses are crimes of violence within the meaning of §924(c), an insupportable proposition (*see James v. United States*, 550 U.S. 192, 222 (2007) (Scalia, J., dissenting) ("The word 'extortion' in ACCA's definition of 'violent felony' cannot, however, incorporate the full panoply of threats that would qualify under the Model Penal Code, many of which are inherently nonviolent"), the fact that the relevant racketeering acts in Ivezaj's indictment alleged little more than extortion is not enough to establish that he was charged with a "crime of violence."

6. Finally, looking to the racketeering acts to define the nature of RICO for purposes of §924(c), as the Second Circuit did in this case, is particularly indefensible in light of the inconsistency it creates with another element of a §924(c)(1)(A) offense, i.e., the crime of violence must be one for which a person may be "prosecuted in a court of the United States." If RICO is defined by the racketeering acts for purposes of labeling the offense a "crime of violence," as the Second Circuit held in this case, the state law predicates in this case are not offenses prosecutable in federal court. *United States v. Acosta*, 124 F. Supp. 2d 631 (E.D. Wis. 2000). Indeed, technically, the RICO predicates are not themselves the crime being prosecuted; the jury in this case was only asked to

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[6] *See* CIA123-27 (Ivezaj's indictment which alleges violations of N.Y. Penal Law §155.05(2)(e)(i) and (ii), when only one of those provisions requires the use of physical force.

determine whether the predicates were "proven" or "not proven," not whether Ivezaj was "guilty" of the predicate acts. Thus, the Second Circuit's rationale is inconsistent, circular and unpersuasive. In the Second Circuit's view, for purposes of the "crime of violence" element of §924(c), the charged predicates define whether RICO is or is not a crime of violence, but for purposes of the element of "prosecut[able] in a court of the United States," it is the RICO offense as a whole, without reference to the predicates, that gives the offense its federal caste. Under the Second Circuit's reasoning, the government would have it both ways.

II. In A Federal Criminal Prosecution Where The Defendant's Guilt Turns On An Entirely New Interpretation Of A State Criminal Statute, Federalism And Due Process Considerations Require The Federal Courts To Certify The Issue To The State's Highest Court

It is one thing to accept the conventional wisdom that hard cases can make bad law. It is quite another to find hard cases in the *federal* courts of appeals making new, and bad, *state law*. The Second Circuit did just that. It decided a new and important question under New York's extortion statute, and decided it wrongly. In the process, the Second Circuit triggered serious federalism and due process problems. More generally, this case raises questions about whether and when to certify a question to the state

courts, issues upon which this Court has given precious little guidance. *See Elkins v. Moreno*, 435 U.S. 647, 662 & n. 16 (1978) (Court *sua sponte* certifies new question to state court because of importance of question to state interests).

1. Where the Second Circuit went wrong on New York law is plain enough. The court re-framed the question to read "whether illegal *intangible goods* qualify as 'property' under New York extortion law" (App. A at 5) (emphasis added), an articulation which demonstrates the court's linguistic gymnastics as well as a misunderstanding of the meaning of "property" under New York law. N.Y. Penal Law. §155.00(1). Control over an illegal gambling enterprise, the "property" under New York's extortion statute alleged in the indictment and defined for the jury over objection, does not constitute "goods" of any sort. The Second Circuit resorted to its new and unsupported formulation in an attempt to overcome the conceptual conundrum posed by characterizing control over a criminal enterprise as a "right." All prior cases, both federal and New York, addressing or touching on the issue of "property" for purposes of extortion law concerned "rights," which by definition must be lawful. *See, e.g., People v. Garland,* 69 N.Y.2d 144 (1987) (leasehold or statutory right to possession of rent controlled apartment is "property" under N.Y. extortion statute); *People v. Spatarella*, 34 N.Y.2d 157 (1957) (contractual right to service carting stops is "property" under N.Y. extortion statute); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006) (union members'

rights under LMRDA to their officers' faithful and honest representation is a property right under Hobbs Act). There has never before been a case, state or federal, that has held an illegal intangible, like control over an illegal gambling enterprise, to be "property."

That is why it was necessary for the Second Circuit in this case to re-frame the question presented from one involving "illegal intangibles," as Ivezaj framed it, to the oxymoron of "intangible goods." The Second Circuit cited *Garland* as authority for that confused and contradictory phrase. App. A at 9 ("In *Garland*, the New York Court of Appeals held that *intangible goods* – in that case, a tenant's right to occupy an apartment – could constitute 'property'") (emphasis added, citation omitted). *Garland*, however, never used the term "intangible goods," and that case did not involve "goods" of any sort. Moreover, *Garland's* holding directly supports Ivezaj's position that intangible "property" within the meaning of New York's extortion statute must derive from a legal "right." 69 N.Y.2d at 147 ("tenants who have a *legal right* to occupy and possess an apartment, whether by lease or under statute, own 'property'") (emphasis added).

Here, characterizing the "property" alleged to be the object of the extortion scheme, i.e., control over an illegal enterprise, as "intangible goods" does not advance analysis. While control over an illegal enterprise is certainly intangible, it does not stem from or connote any "right." And if an intangible is not the

product of a right, it is not "property" under New York law.

The fact that contraband has been held by lower New York courts to be "property" for purposes of New York's larceny and extortion statute does not change the analysis. Under New York's definition of "property," contraband can fairly be called "goods," making the phrase "tangible goods" at least intelligible, because contraband has a corporeal existence separate and apart from the law and, for that reason, it makes some sense to call contraband "property" that can be "owned" and therefore cannot lawfully be taken by theft or force from its "owner." N.Y. Penal Law §155.00(5). As Ivezaj argued below, however,

> there is no reason in law, policy or logic to extend [the New York extortion statute's] protection to an unlawful intangible like control over a criminal enterprise which, like any intangible, has no existence and is not a right unless the law creates and recognizes it.

The Second Circuit never addressed Ivezaj's distinction between contraband and an illegal intangible. Thus, the lower courts erred in their interpretation of New York law, and wrongly decided the central issue raised by the government's theory of the case.

2. Even if control over a criminal enterprise is or can be "property" under New York's extortion statute, Ivezaj argued that he did not and could not "obtain" that property. The Second Circuit characterized

Ivezaj's argument as "imaginative but overly literal and, in any event, not supported by [N.Y.] law." App. A at 11. The New York cases on which the Second Circuit relied, i.e., *Garland* and *Spatarella*, did not consider the meaning of "obtain," but only whether certain intangible rights could be "property" for purposes of New York's extortion statute.

Moreover, the Second Circuit was clearly mistaken in concluding that *Garland* and *Spatarella* were authority for its holding that illegal intangibles can be "obtained" under New York law. App. A at 10-11. In fact, New York law, unlike the Hobbs Act, expressly contemplates the possibility of criminally "obtaining" intangible property rights by defining the term "obtain" to include "the bringing about of a transfer . . . of property *or of a legal interest therein*." N.Y. Penal Law §155.00(2) (emphasis added). In other words, the New York statute explicitly distinguishes between intangible *rights*, as in *Garland* and *Spatarella,* and an illegal intangible. Only the former can be "obtained" by a "transfer of a legal interest therein."

The Second Circuit's reliance on "our jurisprudence interpreting the Hobbs Act" (App. A at 10) demonstrates its failure to appreciate just how murky and ambiguous this area of law is even under the Hobbs Act. Indeed, the federal courts of appeals are divided as to the meaning of the "obtain" element in the Hobbs Act. *See United States v. McFall*, 558 F.3d 951 (9th Cir. 2009). In *McFall*, the Ninth Circuit reversed a Hobbs Act conviction based on its holding

that "restricting the activities of a competitor" by threat under official right did not amount to "obtaining" the competitor's lost opportunities. *Id.* at 958. In so holding, *McFall* noted the "considerable tension" in the case law that resulted from *Scheidler v. NOW*, 537 U.S. 393 (2003), and questioned the correctness of the Second Circuit's decision in *Gotti*. 558 F.3d at 957 n. 7. Had Ivezaj been prosecuted under the Hobbs Act, and not under New York's extortion statute, his conviction would have been reversed in the Ninth Circuit under *McFall*.

Thus, the Second Circuit was almost certainly mistaken when it suggested that Ivezaj, although not charged under the Hobbs Act in Racketeering Acts Four and Five, engaged in extortionate conduct under that federal statute. The Second Circuit was certainly mistaken when it held that Ivezaj had engaged in extortionate conduct under New York's more specific and detailed extortion statute.

3. Despite the foregoing discussion of New York law, Ivezaj's focus in this petition in not precisely on the scope and meaning of New York's extortion statute, although the Second Circuit certainly erred in its interpretation of New York law which was the basis of Ivezaj's conviction on Count 13 carrying a mandatory minimum and consecutive seven-year prison term.[7]

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[7] When Congress creates federal crimes predicated on proving guilt under state statutes, this Court is certainly entitled to review the kind of erroneous determination of state law committed by the Court of Appeals in this case.

Instead, the focus of this petition is on the more fundamental *constitutional* question whether, consistent with the principles of federalism and due process, the Second Circuit should have waded into novel New York legal waters in the context of a federal criminal prosecution instead of certifying the new issue of state law to the New York Court of Appeals, as Ivezaj requested. While not as comprehensive as this Court's certification rule for federal questions, *see* Rule 19, Rules of the Supreme Court of the United States, both the Second Circuit and the New York Court of Appeals have promulgated rules for certification of new or unclear state law questions, and those rules fit this case precisely.[8] The New York criminal law issue in this case, i.e., whether control over a criminal enterprise is "property" under New York's extortion statute and, if so, whether it is "obtainable," plainly satisfied the certification rules of both courts.

4. This Court has long recognized that "state courts are the ultimate expositors of state law."

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[8] Second Circuit Local Rule §0.27 provides in relevant that, "[w]here authorized by state law, this Court may certify to the highest court of the state an unsettled and significant question of state law that will control the outcome of the case pending before this Court." New York Court of Appeals Rule §500.27 provides in relevant part that when it appears to a U.S. Court of Appeals that "determinative questions of New York law are involved in a case pending before that court for which no controlling precedent of the Court of Appeals exists," the federal court may certify the dispositive questions to the New York Court of Appeals.

Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). *See also Elkins v. Moreno*, 435 U.S. at 662 n. 16 ("where as here there is an efficient method for obtaining a ruling from the highest court of a State we do not hesitate to avail ourselves of it."); *Fiore v. White*, 528 U.S. 23, 24-25 (1999) (certifying state law claim made on federal habeas because of uncertainty of the status of state law at the time petitioner's conviction became final). Under our federal system, in which state courts are the final arbiters of their own states' laws, it is not surprising that this Court has recognized the value of the certification procedure and has encouraged its use. When a federal court of appeals needlessly undertakes to decide a new and important issue of state law instead of certifying the question to the state courts, it offends fundamental principles of federalism. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 777 (2005) (Stevens and Ginsburg, JJ., dissenting) ("Powerful considerations support certification in this case. First, *principles of federalism* and comity favor giving a State's high court the opportunity to answer important questions of state law, *particularly when those questions implicate uniquely local matters such as law enforcement and might well require the weighing of policy considerations for their correct resolution*") (emphasis added); *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974) (certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism").

5. Equally important, when a federal court of appeals gratuitously decides a new and important question of state criminal law, as occurred in this case, due process notice concerns are implicated. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The fundamental due process requirement that citizens be given fair notice of the meaning and reach of criminal statutes is violated when a defendant's guilt of serious federal charges turns on a determination by a federal court of the validity of the government's new and dramatic interpretation of a state criminal statute, an interpretation the defendant could have no way of anticipating.

6. Even if a colorable opposing argument could be advanced in support of the government's novel "property" theory, the issue is undeniably close and complicated. The rule of lenity, which Ivezaj invoked below, entitled him to the benefit of the doubt. As this Court has recently held in reversing a mail fraud conviction which also turned on the meaning of the word "property": "[T]o the extent that the word 'property' is ambiguous as placed in §1341, we have instructed that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States,* 531 U.S. 12, 25 (2000). As this case shows, the meaning of "property" under New York's extortion statute is no less ambiguous than the same word was in *Cleveland* interpreting the mail fraud statute.

7. In short, when the government decides to prosecute one of the many federal crimes predicated

on the violation of state criminal statutes,[9] the government and the federal courts have an obligation to hew closely to clear and well-established state law. Under our constitutional system, the government is not permitted to try to make new *state* criminal law in the context of a federal criminal prosecution, and the federal courts generally will not and should not uphold such efforts which threaten the delicate state/federal balance. *United States v. Bass,* 404 U.S. 336, 349-50 (1971); *see also Screws v. United States,* 325 U.S. 91, 144-45 (1945) (Roberts, Frankfurter and Jackson, JJ., dissenting) ("Regard for maintaining the delicate balance 'between the judicial tribunals of the Union and of the states' in the enforcement of the criminal law has informed this Court, as it has influenced Congress, 'in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution' . . . Observance of this basic principle under our system of Government has led this Court to abstain, even under more tempting circumstances than those now here, from needless extension of federal criminal authority into matters that normally are of state concern and for which the States had best be charged with responsibility").

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[9] *See, e.g.,* RICO, 18 U.S.C. §1961(1)(A), money laundering, 18 U.S.C. §1956(c)(7), Travel Act, 18 U.S.C. §1952(b), Lacey Act, 16 U.S.C. §3372(a)(2)(A).

The government's attempt in this case, upheld by the Second Circuit, to stretch state criminal law beyond all prior boundaries – apparently all for the purpose of imposing additional severe penalties for Ivezaj's conviction of a §924(c) offense – threatens to upset the balance between state and federal authority in the criminal law context which this Court has tried so hard to preserve.

8. The Second Circuit gave no reason for eschewing certification and deciding for itself these new and important questions of state criminal law, except the negative and weak rationale that "we see no indication that the New York legislature intended that illegal intangible assets could not be the subject of extortion." App. A at 9-10. The Second Circuit's reasoning is unpersuasive because the question is *not* whether the New York legislature gave any "indication" that it intended to exclude certain conduct from the reach of a state criminal statute, but whether it has ever given any indication that it intended the conduct to be covered by the statute. Here, of course, the New York legislature has given absolutely no indication that it *intended* New York's extortion statute to be interpreted so extremely and bizarrely as to protect criminal enterprises from competitors.

9. The certification process not only has serious constitutional implications, but it is also safer and more efficient, at least in criminal cases. For example, in *Policano v. Herbert*, 453 F.3d 75 (2d Cir. 2006), both the district court and the Second Circuit initially answered a question of New York criminal law in

favor of the state habeas petitioner. On the state's petition for reconsideration, the Second Circuit certified the state law question on which the habeas petition was based, i.e., the status of New York's depraved indifference murder jurisprudence at the time of the prisoner's conviction. Although the Second Circuit noted that certification of state criminal law questions is "not common" (*id.* at 76), it also noted that certification for state criminal law issues has been sanctioned by this Court, citing *Fiore v. White*, 528 U.S. 23. The majority of the *en banc Policano* court also encouraged certification as a way of avoiding the need for *en banc* consideration, particularly since the New York Court of Appeals has been "a welcoming partner in the certification process." 453 F.3d 79, 80 (2d Cir. 2006) (*en banc*). On certification, the New York Court of Appeals rejected the district court's and the Second Circuit's understanding of New York law on depraved indifference murder, causing the Second Circuit to reverse the district court and dismiss the habeas petition. 507 F.3d 111 (2d Cir. 2007).

Policano shows the extraordinary benefits of certification even when the answer to the state law question may seem clear to the Court of Appeals. In *Policano*, not only did certification prevent a state prisoner's murder conviction from being needlessly vacated, but certification vitiated the rationale for time-consuming *en banc* consideration.

If anything, certification was and is warranted in this case even more than in *Policano*, where the New York courts at least had the opportunity to consider

the petitioner's claim during trial and on the judgment appeal. Here, no New York court has ever had a chance to pass on the serious state law "property" and "obtain" issues raised by Ivezaj. The Second Circuit, or this Court, should want the authoritative opinion of the New York Court of Appeals on these novel and important state law questions.

10. On certification, if the New York Court of Appeals disagrees with the determination of the district court and the Second Circuit concerning the meaning of New York's extortion statute, there will be little harm or loss. Ivezaj would likely be entitled to little more on remand than vacatur of his conviction on the weapons count, the striking of Racketeering Acts Four and Five, and a resentencing.[10] If certification is not used, however, and the New York courts in later cases reject the Second Circuit's interpretation of New York's extortion statute, as the state courts are free to do, a grave injustice will be worked on Ivezaj, particularly since he would likely have no right to challenge his federal conviction on the basis of subsequent state law developments. *Town of Castle Rock*, 545 U.S. at 778 (Stevens and Ginsburg, JJ., dissenting) ("certification would promote both judicial economy and fairness to the parties. After all, the Colorado Supreme Court is the ultimate authority on

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[10] The jury found proven three other racketeering acts not involving the use of weapons. As a result, in all likelihood Ivezaj's RICO conviction would stand, and only his sentence would be affected.

the meaning of Colorado law, and if in later litigation it should disagree with this Court's provisional state-law holding, our efforts will have been wasted and respondent will have been deprived of the opportunity to have her claims heard under the authoritative view of Colorado law"). At the very least, confusion would reign if the state and federal courts in any circuit disagree over the meaning and scope of state law, ultimately requiring this Court's intervention. *See, e.g., Payton v. New York,* 445 U.S. 573, 574-75 (1980) (certiorari granted to review conflict between Second Circuit and N.Y. Court of Appeals as to whether Fourth Amendment requires a warrant to make an arrest in the home).

11. In short, while certification in a criminal case may be uncommon, that is only because the government generally does not attempt to make new state law in the context of a federal criminal prosecution, and the lower federal courts would not generally uphold such an attempt. Certainly certification is more common than what the government did here, i.e., bring a serious federal criminal prosecution based on a new and far-reaching interpretation of a state criminal statute. In upholding the government's theory, without seeking the guidance of the New York Court of Appeals, the government and Second Circuit have broken dangerous new ground in New York and U.S. constitutional law which threatens the state/federal balance. Rules 10(a) & (c), Rules of the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.[11]

Respectfully submitted,

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January 2010

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[11] Some of Ivezaj's codefendants (Rudaj, Dedaj, Colotti, Nuculovic and DiPietro) may also file petitions seeking this Court's review of issues that may benefit Ivezaj.

APPENDIX A

UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

August Term, 2007

(Argued: May 13, 2008 Decided: June 11, 2009)

Docket Nos. 06-3112-cr (L), 06-3275-cr (CON), 06-3296-cr (CON), 06-3339-cr (CON), 06-3372-cr (CON), 06-5908-cr (CON).

UNITED STATES OF AMERICA,

Appellee,

– v. –

PRENKA IVEZAJ, NARDINO COLOTTI, ALEX RUDAJ, ANGELO DIPIETRO, NIKOLA DEDAJ, AND LJUSA NUCULOVIC,*

Defendants-Appellants.

Before: FEINBERG, MINER, and B.D. PARKER, *Circuit Judges*.

Defendants appeal from the judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) for racketeering, RICO conspiracy, conspiracy to conduct

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* The Clerk of Court is directed to amend the official caption as indicated.

an illegal gambling business, and using and carrying firearms during and in relation to a crime of violence. Affirmed.

RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y., *for Defendant-Appellant Prenka Ivezaj.*

RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y., *for Defendant-Appellant Nardino Colotti.*

HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y., *for Defendant-Appellant Alex Rudaj.*

JONATHAN SVETKEY, New York, N.Y., *for Defendant-Appellant Angelo DiPietro.*

DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y., *for Defendant-Appellant Nikola Dedaj.*

JOHN BURKE, Brooklyn, N.Y., *for Defendant-Appellant Ljusa Nuculovic.*

JENNIFER G. RODGERS, Assistant U.S. Attorney (Timothy J. Treanor, Benjamin Gruenstein & Jonathan S. Kolodner, Asst. U.S. Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y., *for Appellee.*

BARRINGTON D. PARKER, JR., *Circuit Judge*:

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (collectively "appellants" or

"defendants") appeal from judgments of conviction entered in the United States District Court for the Southern District of New York (Cote, *J.*) on charges arising from their involvement in a racketeering enterprise. We affirm the convictions for the reasons stated in this opinion and in a companion summary order.

BACKGROUND

The indictment charged, and the trial evidence, considered in the light most favorable to the government, established that the appellants were members of the Rudaj Organization (the "Organization"), a violent Albanian racketeering organization based in New York City and Westchester County. The government alleged that the Organization sought to challenge, through violence and intimidation, the primacy of the New York City area's traditional organized crime families. Gambling was a particularly active area of competition. After operating illegal gambling businesses in the Bronx and Westchester County, the Rudaj Organization forcibly took over several illegal gambling clubs in Astoria, Queens and required other bars and restaurants to install and use its gambling machines. In addition to gambling, the Organization engaged in a variety of other illegal conduct, including extortion, loansharking, and bank fraud.

These activities generated an indictment initially containing twenty-one counts, fifteen of which were ultimately presented to the jury. We address here

only those relevant to our opinion. Count One charged all of the appellants with substantive racketeering, and Count Two charged them with racketeering conspiracy. *See* 18 U.S.C. § 1962(c), (d). To establish the pattern of racketeering activity charged in Count One, the government alleged that the defendants engaged in a series of predicate acts, many of which were also charged as separate counts. Of these, Racketeering Acts Four and Five are at the center of our analysis. Racketeering Act Four alleged that Rudaj, Dedaj, Ivezaj, Nuculovic, and DiPietro attempted to extort, conspired to extort, and extorted control of an illegal gambling operation from Fotios Dimopoulos and Antonios Balampanis. Racketeering Act Five charged Rudaj, Colotti, Dedaj, Ivezaj, Nucolovic, and DiPietro with extorting and conspiring to extort the owners of a gambling business, known as "Soccer Fever," in violation of New York's extortion laws. *See* N.Y. Penal Law §§ 105.13, 155.05, 155.40. All defendants were also charged in Count Thirteen with using and carrying firearms in aid of racketeering. *See* 18 U.S.C. §§ 924(c)(1)(A)(ii) & 2.

The government's evidence included the testimony of investigating officers, various cooperating witnesses and victims, consensual tape recordings, recorded conversations from Title III interceptions, as well as physical evidence seized during various searches. At the conclusion of the trial, the district court dismissed several of the counts. The defendants were then convicted on all but one of the remaining

counts (but not all of the predicate racketeering acts) and were sentenced to substantial prison terms.

The defendants appeal on various grounds. We decide here that control over illegal intangible property – here a gambling operation – is "property" that can be "delivered" under New York's extortion statute. We also conclude that Balampanis was a proper "victim" of an inchoate extortion offense under New York law; that Count One qualified as a "crime of violence" under 18 U.S.C. § 924(c); and that the district court did not err in applying a role enhancement to Ivezaj's sentence. Additionally, we decide that the admission of evidence seized from Rudaj's home, if error at all, was harmless. Accordingly, we affirm the judgments.

DISCUSSION

I. Whether Illegal Intangible Goods Qualify as "Property" under New York Extortion Law

Defendants[1] challenge their convictions on Racketeering Acts Four and Five, which alleged violations of New York's extortion laws.[2] Their main contention

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[1] Several of the defendants simply join in the arguments of their co-defendants where there is no inconsistency between those arguments and the arguments made in their own briefs. We use the general term "defendants" to avoid confusion.

[2] State law crimes such as extortion can constitute racketeering acts under RICO. 18 U.S.C. § 1961(1)(A) includes "any act or threat involving . . . extortion, . . . which is chargeable under

(Continued on following page)

is that the alleged acts are legally insufficient to sustain a conviction because control over illegal gambling does not constitute "property" under New York's extortion law and, even if it did, no property was "delivered" as is required by the statute. We review *de novo* the grant or denial of a Rule 29 motion for judgment of acquittal. *United States v. Eppolito,* 543 F.3d 25, 45 (2d Cir. 2008); *United States v. Florez,* 447 F.3d 145, 154 (2d Cir. 2006).

As proof of Racketeering Act Four, the government established that the Organization, through violence and intimidation, wrested control of certain illegal gambling operations in Astoria from the Lucchese Crime Family. In June of 2001, members of the Rudaj Organization seriously assaulted Antonios Balampanis, a close companion of Fotios Dimopoulos, a Lucchese family associate who supervised their Astoria operations. Dimopoulos later told Balampanis that his beating had been intended as "a message" for Dimopoulos, and Dimopoulos never returned to gambling clubs in Astoria following the assault.

Racketeering Act Five related to the Rudaj Organization's operation of "barbut," a lucrative gambling activity in Astoria. In early August 2001, a Gambino associate, Tommy Napoli, opened a gambling club known as "Soccer Fever" that directly competed with barbut and was operated by Mikhail

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State law and punishable by imprisonment for more than one year" in its definition of "racketeering activity."

Hirakis. On the club's first night, Soccer Fever brought in approximately $8,000. The next night, approximately fifteen members of the Organization, including the six defendants, stormed the club with guns on the instruction of Rudaj and broke up the game. They intended to assault Napoli, but when they were unable to locate him, they assaulted Hirakis instead. Rudaj intimidated the club's patrons: "I don't want to see nobody here. If I see [you] one more time, I swear to God . . . I beat you . . . one by one. I eat you up. . . . It's closed." That was the end of Soccer Fever, and the Organization subsequently extended its control of illegal gambling in Astoria.

Under New York law, "[a] person obtains property by extortion when he compels or induces another person to deliver such property to himself or to a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . [c]ause physical injury to some person in the future. . . ." N.Y Penal Law § 155.05(2)(e)(1). "Property" is defined as "any . . . personal property . . . or any article, substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1).

The district court instructed the jury that "[t]he term property includes not only money and other physical or tangible things, but also any valuable right considered as a source or element of wealth." Moreover, "[t]he pursuit of a business, including the solicitation of customers necessary to the conduct of the business, is considered property, as are the

proceeds of a business." Further, the court charged that "[i]t does not matter . . . if the victim's initial acquisition or possession of tangible property was illegal, or if the business in which the victim is engaged is illegal. Illegally obtained assets and businesses conducted in violation of the law can constitute property."

While acknowledging that an intangible good may constitute property under New York law, defendants challenge this instruction on the ground that "control over illegal gambling" does not constitute property because a legal right to the alleged property is required before it can qualify as property under New York law. They contend that because the Luccheses and the various victims had no legal right to operate an illegal gambling business, Racketeering Acts Four and Five did not sufficiently allege extortion.

We agree with the district court that an illegal gambling business can constitute property under New York law. The statute broadly defines "property" as "any . . . personal property, real property . . . substance or thing of value . . . which is provided for a charge or compensation." N.Y. Penal Law § 155.00(1). Illegal intangible property, such as that contemplated here, fits within this expansive definition: control over illegal gambling is a "thing of value" which is "provided for . . . compensation."

This understanding is consistent with the New York courts' recognition that intangible property as

well as illegal tangible property are covered by the statute. For example, in *People v. Garland,* 69 N.Y.2d 144, 147 (1987), the New York Court of Appeals held that intangible goods – in that case, a tenant's right to occupy an apartment – could constitute "property," noting that "an interest need not be transferable to constitute 'property' [under N.Y. Penal Law § 155.00(1)]." *See also People v. Spatarella,* 34 N.Y.2d 157, 162 (1974) ("property" includes intangible goods, because "[s]urely the extortionist's demand for the business itself, or a part of it, is, if anything, more egregious than the demand simply for money"); *People v. Dixson*, 798 N.Y.S.2d 659, 664 (Crim. Ct. 2005). Under New York law, illegal tangible goods can also constitute "property." *See People v. Hardwick*, 524 N.Y.S.2d 798, 800 (App. Div. 1988) ("That it was unlawful for [the victims] to possess the narcotics is no defense to the defendant's unlawful taking of them."); *People v. Izzo*, 409 N.Y.S.2d 623, 624 (Crim. Ct 1978) ("Ownership . . . is a broad concept. Even a person who has himself stolen property has a right of possession superior to that of a third person who wrongfully takes it from him. . . ."); *see generally People ex rel. Short v. Warden of City Prison*, 130 N.Y.S. 698, 700 (App. Div. 1911) ("'[P]roperty'" is "intended to embrace every species of valuable right and interest, and whatever tends in any degree, no matter how small, to deprive one of that right, or interest, deprives him of his property."). Given such an expansive definition of "property," and the absence of any legality requirement in the statute, we see no indication that the New York legislature intended

that illegal intangible assets could not be the subject of extortion.

Our jurisprudence interpreting the Hobbs Act also supports our analysis here. The Hobbs Act was modeled on the New York extortion statute, and New York courts have often looked to Hobbs Act jurisprudence for guidance. *See, e.g., People v. Capparelli*, 603 N.Y.S.2d 99, 104 n.1 (Sup. Ct. 1993) (citing cases for the proposition that "New York appellate courts frequently refer to federal cases interpreting the Hobbs Act"); *see also Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 403 (2003) ("Congress used two sources of law as models in formulating the Hobbs Act: the Penal Code of New York and the Field Code, a 19th-century model penal code."). In *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), we reviewed our Hobbs Act precedents following the Supreme Court's decision in *Scheidler*, and we reaffirmed that "intangible property rights can qualify as extortable property under the Hobbs Act. . . ." 459 F.4d [sic] at 323. Moreover, we held that such rights "can qualify as extortable property under the Hobbs Act regardless of whether its exercise, transfer, or sale would be legal." *Id.* at 325. Importantly, we did not "see any basis for imposing a 'legality' requirement on the extortion of both tangible and intangible property." *Id.* at 326.

Defendants argue that even if control over an illegal gambling business could be extorted under New York law, defendants did not "obtain" this property because it was never "delivered" to them. *See*

N.Y. Penal Law § 155.05(2)(e). We find this interpretation imaginative but overly literal and, in any event, not supported by the law. Under New York law, an intangible property right – which by definition cannot be "delivered" in the traditional sense – can be extorted. *See Garland*, 69 N.Y.2d at 146-47; *Spatarella*, 34 N.Y.2d at 162 ("property" under the extortion statute includes intangible rights). For similar reasons, we reject defendants' argument that they could not have transferred or delivered control over a criminal business "in any sense that the law protects." Again, it is established under New York law that illegal goods, such as drugs or drug proceeds, which are not capable of lawful transfer, fall under the extortion statute. *See Hardwick*, 524 N.Y.S.2d at 800.

II. Whether Balampanis is a Victim of Inchoate Extortion Offenses Under New York Law

The defendants also argue that "[w]hatever the reason for Balampanis's beating, he could not be the actual or intended 'victim' of an inchoate extortion offense." New York law requires that the victim of a substantive extortion offense be an "owner" of the extorted property. Defendants focus on the use of the word "owner" in the statute, which provides that "[w]hen property is taken, obtained or withheld by one person from another person, an 'owner' thereof means any person who has a right to possession thereof superior to that of the taker, obtainer or withholder." N.Y. Penal Law § 155.00(5). They contend

that the government's proof and the court's charge were insufficient because the "victim" of extortionate conduct must own or control the property extorted, and Balampanis did neither.

The district court rejected the defendants' arguments. On this count, in response to a jury request on this issue,[3] the court instructed the jury as follows:

> THE COURT: Racketeering Act Four charges three crimes. To find that the crime of extortion was committed, you must find that at least Foti Dimopoulos was a victim of the extortion.
>
> With respect to the crimes of attempted extortion and conspiracy to commit extortion, you must find that at least one of the two identified victims in Racketeering Act Four, Foti Dimopoulos and Tony Balampanis, was an intended victim of those crimes.
>
> You may also consider or lump together the evidence regarding both identified victims to decide whether the government has proven any one of these three charges; extortion, attempted extortion or conspiracy to commit extortion. Remember in this context that it is a crime to use force or violence against one person to obtain property from another with that second person's consent by instilling

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[3] The jury sent a note during deliberations asking whether "the victims, Foti Dimopoulos and Tony Balampanis, [should be] looked at individually or lumped together as victims[.]"

> fear in that second person, as I have explained in my charge.

Given the tripartite nature of Racketeering Act Four – which alleged that several of the defendants engaged in extortion conspiracy, substantive extortion, and attempted extortion and that "any one of which . . . constitutes the commission of Racketeering Act Four" – we find no error in the court's instructions. The district judge properly charged that Balampanis could be a victim for the attempt and conspiracy offenses. The fact that Balampanis was not actually the owner does not matter for these offenses; rather, the key inquiry for the jury in an attempted extortion charge is whether the defendants *thought* he was. *See People v. Davis,* 72 N.Y.2d 32, 36 (1988) ("[F]actual impossibility will not provide a defense to a prosecution for attempted intentional acts. . . ."); *People v. Gardner,* 144 N.Y. 119, 124-26 (1894) (factual impossibility is no defense to attempt because attempt "depends upon the mind and intent of the wrongdoer, not on the effect or result upon the person sought to be coerced"); N.Y. Penal Law § 110.10 ("If the conduct in which a person engages otherwise constitutes an attempt to commit a crime . . . , it is no defense . . . that the crime charged to have been attempted was . . . factually or legally impossible of commission. . . ."). The same is true for conspiracy; only the defendants' state of mind is relevant. *See People v. Russell*, 555 N.Y.S.2d 67, 68 (App. Div. 1990) (impossibility is not a defense to conspiracy).

Because there was ample evidence that the defendants believed Balampanis, a close associate of Dimopoulos, helped control illegal gambling in Queens – no matter whether he did or not – we conclude that the district court did not err in denying the defendants' Rule 29 motion and charging the jury that Balampanis could be a victim of the attempt and conspiracy charges.

III. Defendants' 18 U.S.C. § 924(c) Convictions

Next, defendants challenge their firearms convictions. Under 18 U.S.C. § 924(c)(1)(A), "any person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm" is guilty of a federal crime. Count Thirteen charged the defendants with violating this provision, specifically naming Count One, the substantive racketeering charge, as the predicate crime of violence.

Defendants raise two challenges to their § 924(c) conviction. First, they challenge the district court's ruling that Count One qualifies as a "crime of violence." The district court held that the convictions fell within § 924(c), because Count One specifically charged violent predicate racketeering acts, even though a conviction under § 1962 is not necessarily a conviction for a crime of violence.

A crime of violence is an offense that "has as an element the use, attempted use, or threatened use of

physical force against the person or property of another" or "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 924(c)(3)(A), (c)(3)(B). When determining whether an offense is a "crime of violence" under the statute, we employ a "categorical approach," in which "we focus on the intrinsic nature of the offense rather than on the circumstances of a particular crime." *United States v. Acosta,* 470 F.3d 132, 135 (2d Cir. 2006). In *Acosta,* we concluded that a conspiracy to "injure, oppress, threaten, or intimidate any person" in connection with exercising their constitutional rights under 18 U.S.C. § 241 was a crime of violence. We reasoned that "[s]ince applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." *Id.* at 136.

Applying this categorical approach, we first look to "the intrinsic nature" of the statute. Section 1962(c), the statutory basis for the substantive racketeering offense in Count One, provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." A pattern of racketeering activity is defined as

"at least two acts of racketeering activity. . . ." 18 U.S.C. § 1961(5). *See United States v. Gotti*, 451 F.3d 133, 136-37 (2d Cir. 2006) (elaborating on how a "pattern of racketeering" may be proven).

Because racketeering offenses hinge on the predicate offenses comprising the pattern of racketeering activity, we look to the predicate offenses to determine whether a crime of violence is charged. Applying this reasoning, we hold that where the government proves (1) the commission of at least two acts of racketeering and (2) at least two of those acts qualify as "crime[s] of violence" under § 924(c), a § 1962 conviction serves as a predicate for a conviction under § 924(c).[4] We thus find no error in the district court's conclusion that the charged RICO offense was a crime of violence. The underlying predicate acts, with one exception,[5] allegedly involved the use of violent means, including loansharking and violent acts of extortion; unquestionably, the conduct charged in Count One posed a "substantial risk that physical

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[4] This conclusion aligns neatly with our caselaw that a RICO conspiracy can constitute a "crime of violence" under statutes that provide virtually identical definitions of that term to the definition provided in § 924(c). *See, e.g., United States v. Ciccone*, 312 F.3d 535, 541-42 (2d Cir. 2002) (holding that the charged RICO conspiracy was a crime of violence under the Bail Reform Act); *United States v. Doe*, 49 F.3d 859, 866-67 (2d Cir. 1995) (finding no error in district court's ruling that a RICO conspiracy was a crime of violence under the Juvenile Delinquency Act).

[5] The only predicate act that was not a crime of violence was one charging gambling offenses.

force against the person or property of another" would be used in its commission. *See* 18 U.S.C. § 924(c)(3)(A), (c)(3)(B).

The defendants' second contention is that, because the violent predicates were state law offenses, their crime of violence was not one "prosecut[able] in a court of the United States" as required by § 924(c). We conclude that whether the alleged firearms conduct was premised on state or federal predicates is irrelevant, provided that the government proves, as it did here, that the § 1962 offense alleging the pattern of racketeering is a crime of violence. The jury only considered the state law predicates to determine that the defendant used firearms as charged in Count One, which, as previously discussed, is undeniably a crime "prosecut[able] in a court of the United States" and a "crime of violence" for the purposes of § 924(c).

IV. Whether Evidence from Rudaj's Home Should Have Been Suppressed

We next consider whether the district court erred in admitting evidence taken from a search of Rudaj's bedroom and walk-in closet. On an appeal from a district court's ruling on a motion to suppress evidence, we review the court's factual findings for clear error, viewing the evidence in the light most favorable to the government. The district court's legal conclusions are reviewed *de novo*. *See United States v. Rodriguez*, 356 F.3d 254, 257 (2d Cir. 2004).

At approximately 6:30 in the morning on October 26, 2004, federal law enforcement agents knocked on Rudaj's door to execute an arrest warrant. The agents did not have a search warrant for Rudaj's home. Rudaj answered the door unarmed and in his boxer shorts; the government accompanied him inside, purportedly to get him dressed. Rudaj told the agents that he had a loaded hunting rifle next to his bed, which they would see when they entered his bedroom. He also said that no other individuals other than his wife and children were in the home.

After handcuffing Rudaj, the agents then secured the rest of his family members on the first floor and executed what they termed a "protective sweep," which included, as one agent testified, "the bedroom in part because we have to be in the residence in order to get him dressed." Agent Gregory Massa testified that he and his partner went upstairs to the master bedroom, and after observing the rifles propped against the bed, cleared the bedroom to ensure the safety of themselves and the other agents and to confirm that no one else was there.

They first entered the walk-in closet in the master bedroom because it "posed the greater threat." They saw the barrel of a rifle above a pile of clothing and proceeded to clear that corner of the closet. Agent Massa testified that while doing so, they "noticed another weapon that was shorter, another rifle that was shorter in length, and several clear plastic bags which you could clearly see that contained gun cleaning equipment, things of that nature, all right in

the same area." They also saw a green handgun case and two knives. The agents then cleared the second smaller closet and saw another bag, similar to those seized from the walk-in closet, and a box that contained handgun holsters, a taser, and handcuffs.

The district court denied in part and granted in part Rudaj's motion to suppress the evidence taken from his home. The court first concluded that the search of his closets could not be characterized as a protective sweep incident to his arrest. Applying *Maryland v. Buie,* 494 U.S. 325 (1990), the district court found that the sweep did not involve a search "adjoining the place of arrest" nor did the agents have articulable facts regarding the presence of others posing a danger to them to justify a more far-reaching search.

Nevertheless, the court ruled that the evidence from the search of the bedroom – the two guns on either side of the night stand and the money and keys found on the dresser – was admissible. Looking to our holding in *United States v. Di Stefano,* 555 F.2d 1094, 1101 (2d Cir. 1977), in which we held that officers have a duty to find clothing when the defendant is arrested in a state of undress, the court concluded that the agents properly secured Rudaj and, in looking for his clothing in the bedroom, could seize the contraband in his bedroom that was in plain view.

The district court further ruled that the evidence from the walk-in closet was admissible as a security sweep incident to the search for Rudaj's clothing. The

district court reasoned that "[t]here is every reason to find that the balance struck in *Buie* should extend to protective searches that are conducted incident to the entry into a residence for the purpose of securing clothes for an insufficiently dressed arrestee." Therefore, because the area in the walk-in closet could potentially harbor a dangerous individual, the agents appropriately opened the closet door and observed the barrel of a handgun lying on a shelf in plain view and were therefore entitled to search the back of the closet and seize the weapon. While there, the court reasoned, they could also seize other incriminating evidence in plain view. However, the district court concluded that the evidence from the second, smaller closet was inadmissible because the objects removed from that closet – a white plastic bag and a plain cardboard box – were not "patently incriminating" because, unlike the white plastic bags properly removed from the master closet, the [sic] "the bag in the smaller closet did not reveal any incriminating contents through the transparent plastic." Thus, the agents were not justified in removing that bag from the closet to assess its contents.

We agree that the agents were permitted to enter Rudaj's bedroom to find clothing for him and seize any incriminating evidence that was in plain view. However, Rudaj also argues that the district court wrongfully expanded the scope of the "protective sweep" doctrine by admitting the evidence seized from the closets. In *United States v. Miller,* 430 F.3d 93 (2d Cir. 2005), decided after the district court's

denial of Rudaj's suppression motion, we specifically held that the "protective sweep" doctrine delineated in *Buie* applies in "circumstances other than during the in-home execution of an arrest warrant." *Miller,* 430 F.3d at 100. Similarly, we stated that protective sweeps would be justified only if the police possessed "specific, articulable facts giving rise to a reasonable inference of danger." *Id.* Rudaj argues that because the officers had no articulable reason to believe that the closets posed any danger, the district court should have suppressed all of the evidence from the closets.

We need not even resolve the question of whether *Miller* extends to the search of the closets at issue here, because we conclude that the admission of the evidence against Rudaj, if error at all, was harmless. A district court's erroneous admission of evidence is harmless "if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury." *United States v. Garcia,* 291 F.3d 127, 143 (2d Cir. 2002) (quoting *United States v. Rea,* 958 F.2d 1206, 1220 (2d Cir. 1992)). In conducting harmless error review, we consider the following factors: "(1) the overall strength of the prosecution's case; (2) the prosecutor's conduct with respect to the improperly admitted evidence; (3) the importance of the wrongly admitted [evidence]; and (4) whether such evidence was cumulative of other properly admitted evidence." *United States v. Kaplan,* 490 F.3d 110, 123 (2d Cir. 2007) (quoting *Zappulla v. New York,* 391 F.3d 462, 468 (2d Cir. 2004) (internal quotation marks

omitted)); *see also United States v. Garcia*, 413 F.3d 201, 217 (2d Cir. 2005).

Although the government discussed the evidence at summation, we conclude that the admission of the evidence was harmless error. First, the government's evidence as to the issue of Rudaj's involvement in violent conduct was extensive. Several of Rudaj's recorded conversations in which he described engaging in violent extortionate conduct involving guns were heard by the jury. Additionally, multiple witnesses testified about the violent crimes that Rudaj committed in furtherance of the Organization. Thus, the evidence consisting of the rifles and ammunition seized at the scene was cumulative of the testimonial evidence regarding Rudaj's participation in violent racketeering acts. Further, it is unlikely that Rudaj was prejudiced by the government's statements. The district court instructed the jury that it could only convict Rudaj of the § 924(c) charge if it found that he had used or carried a firearm in connection with either the extortion of Dimopoulos and Balampanis or that of the Soccer Fever victims. In light of these instructions, the seized evidence from his house had little impact on Rudaj's § 924(c) conviction. Because the government adduced ample evidence to establish Rudaj's commission of the substantive RICO offense apart from the admission of the guns, we see no reason to disturb his conviction.

V. Ivezaj's Role Enhancement

Finally, Ivezaj challenges his sentence on the ground that any aggravating role enhancement the district court applied should have been based on the conduct alleged in the underlying predicate acts, rather than on his role in the RICO enterprise as a whole. We typically review a district court's factual findings in support of a role enhancement for clear error. *See United States v. Huerta,* 371 F.3d 88, 91 (2d Cir. 2004). However, because Ivezaj's challenge requires us to make a legal determination about the applicability of the enhancement, we review the district court's determination *de novo. See United States v. Chacko,* 169 F.3d 140, 150 (2d Cir. 1999).

U.S.S.G. § 2E1.1 addresses the base offense levels for RICO offenses, requiring a base offense level of 19 or the offense level applicable to the underlying racketeering activity. Application Note 1 to the Guideline provides that:

> Where there is more than one underlying offense, treat each underlying offense as if contained in a separate count of conviction for the purposes of subsection (a)(2). To determine whether subsection (a)(1) or (a)(2) results in the greater offense level, apply Chapter Three, Parts A, B, C, and D to both (a)(1) and (a)(2). Use whichever subsection results in the greater offense level.

U.S.S.G. § 2E1.1, cmt. n.1. Because the Application Note treats each predicate act as "if [it were] contained in a separate count of conviction" for purposes

of determining the offense level for the alleged racketeering activity, Ivezaj argues that the district court failed to consider his role in each charged act when applying the role enhancement.

We agree with the district court that a defendant's role adjustment is to be made on the basis of the defendant's role in the overall RICO enterprise. In *United States v. Damico,* the Seventh Circuit concluded that:

> [The Application Note] only requires the underlying offenses to be treated separately "for the purposes of subsection (a)(2)" – that is, only for the purpose of establishing the base offense level applicable to the RICO conspiracy. The note does not say that the separate treatment extends as well to application of the Chapter Three adjustments.

99 F.3d 1431, 1437 (7th Cir. 1996); *accord United States v. Yeager,* 210 F.3d 1315, 1316 (11th Cir. 2000).

We find *Damico* persuasive. First, as the government contends, analyzing a defendant's role in the overall RICO enterprise makes a good deal more sense than considering his role in each underlying predicate. In the case of a § 3B1.1(b) role enhancement, it makes little sense to allow a defendant who acts in a leadership capacity in a wide-ranging criminal enterprise to have his offense level adjusted on the basis of his participation in discrete racketeering acts. For example, a defendant who served as a leader or manager of an extensive RICO enterprise

should not be able to avoid a role enhancement simply because certain predicate acts involved fewer than five participants or criminal activity that was not extensive. Second, we agree that the language of the Guidelines is clear that the requirement to look at each individual act in a RICO offense is only for the purpose of establishing the base level offense, not for applying the Chapter Three adjustments.

Therefore, we agree with the Seventh Circuit that there is "nothing in section 2E1.1 or its commentary to indicate that an adjustment like that in section 3B1.1 should not be applied to a RICO base offense level . . . in the same way that it would to any other base offense level," that is, "by looking to the count of conviction . . . and all relevant conduct. . . ." *Damico,* 99 F.3d at 1437. Because there was sufficient evidence to show that Ivezaj qualified for the enhancement for his role in the overall RICO enterprise, we affirm his sentence.

CONCLUSION

For the foregoing reasons, the judgments of conviction are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 11th day of June, two thousand nine,

PRESENT:

HON. WILFRED FEINBERG,
HON. ROGER J. MINER,
HON. BARRINGTON D. PARKER,
Circuit Judges.

United States of America,

Appellee,

-v.-

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,*

Defendants-Appellants.

Nos. 06-3112-cr (L),
06-3275-cr (CON),
06-3296-cr (CON),
06-3339-cr (CON),
06-3372-cr (CON),
06-5908-cr (CON)

SUMMARY ORDER

FOR DEFENDANT-APPELLANT IVEZAJ: RICHARD A. GREENBERG (Steven Y. Yurowitz, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT COLOTTI: RICHARD WARE LEVITT (Yvonne Shivers, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT RUDAJ: HAROLD PRICE FAHRINGER (Erica T. Dubno, *on the brief*), New York, N.Y.

FOR DEFENDANT-APPELLANT DIPIETRO: JONATHAN SVETKEY, New York, N.Y.

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* The Clerk of Court is directed to amend the official caption as indicated.

FOR DEFENDANT-APPELLANT DEDAJ:	DIARMUID WHITE (Brendan White, *on the brief*), New York, N.Y.
FOR DEFENDANT-APPELLANT NUCULOVIC:	JOHN BURKE, Brooklyn, N.Y.
FOR APPELLEE:	JENNIFER G. RODGERS, Assistant United States Attorney (Timothy J. Treanor, Benjamin Gruenstein and Jonathan S. Kolodner, Asst. United States Attorneys, *on the brief*), *for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, N.Y.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgments of conviction are AFFIRMED.

Defendants-Appellants Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic (the "defendants") appeal their judgments of conviction entered by the United States District Court for the Southern District of New York (Cote, *J.*) on racketeering and other charges. We assume the parties' familiarity with the underlying facts, procedural history, and issues presented on appeal, as well as the opinion in this case filed separately today.

Defendants challenge the district court's refusal to discharge Juror Four. Several defense counsel moved to dismiss the juror, complaining that the juror engaged in outbursts and other behavior suggesting antagonism towards the defendants. Rather than dismiss the juror, the district court gave general instructions to the jury reminding them to keep open minds and refrain from discussing the case or sharing opinions aloud before the termination of trial. "The determination of whether a juror can serve impartially will not be disturbed absent a clear abuse of discretion." *United States v. Perez,* 387 F.3d 201, 205 (2d Cir. 2004). Because we give trial judges broad flexibility in handling such matters, we find no abuse of discretion here.

Defendant Colotti contends that the district court erred in excusing Juror 90. Both the judge and the courtroom deputy spoke with the juror on different occasions regarding personal matters that were interfering with her ability to serve. Eventually, the juror was dismissed. We find no abuse of discretion in the manner in which the district court handled the dismissal.

Several defendants also claim that the district court erred in admitting non-testifying codefendant Nuculovic's inculpatory statements to federal agents. Before he was arrested, Nuculovic admitted that he had been involved in a criminal organization run by Colotti, Rudaj, and Dedaj. When the government informed the district court of its intention to offer his statements, the defendants moved for severance on

the grounds that the admission of the testimony would violate the Sixth Amendment's Confrontation Clause. The court instead ordered a number of redactions. The orders precluded any government witness from testifying about Nuculovic's use of the phrase "three leaders" to describe the leadership of the Rudaj Organization as such testimony would implicate Colotti, Rudaj, and Dedaj. After one of the agents testified that Nuculovic had stated that he and "three leaders" of the organization took over illegal gambling, the court recessed and reminded the parties that it had prohibited the government from referring to the "three leaders." At that point, counsel for Rudaj, Colotti, and Dedaj moved for a mistrial, which the district court denied. In response to defense counsel's desire not to call additional attention to the agent's mistake, the district court struck the statements from the record outside the presence of the jury.

We review a district court's evidentiary decisions for abuse of discretion, *see United States v. Thompson*, 528 F.3d 110, 120 (2d Cir. 2008), and find none here. The district court specifically instructed the jury prior to the agent's testimony that Nuculovic's inculpatory statements were being admitted solely against Nuculovic and that the jury was not to consider the statements against any other defendant. "Absent evidence to the contrary, we must presume that juries understand and abide by a district court's limiting instructions." *United States v. Downing*, 297 F.3d 52, 59 (2d Cir. 2002). Additionally, the district

court found that the statements were sufficiently redacted so that no other defendant could be implicated by Nuculovic's admission. We believe that any prejudice stemming from the testimony was minimal and was adequately addressed by the district court's prophylactic measures. Accordingly, the defendants' challenges fail.

Rudaj and Colotti next challenge the district court's failure to dismiss one of the racketeering acts. Because the jury ultimately found that charge unproven, the defendants claim that we should conclude retroactively that the racketeering act was improperly joined because it had a prejudicial spill-over effect. "The term 'retroactive misjoinder' refers to circumstances in which the 'joinder of multiple counts was proper initially, but later developments – such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions – render the initial joinder improper.'" *United States v. Hamilton,* 334 F.3d 170, 181 (2d Cir. 2003) (quoting *United States v. Jones,* 16 F.3d 487, 493 (2d Cir. 1994)). "The concept of prejudicial spillover . . . requires an assessment of the likelihood that the jury, in considering one particular count or defendant, was affected by evidence that was relevant only to a different count or defendant." *Hamilton,* 334 F.3d at 182. Here we discern no prejudicial effect, given the overall strength of the government's case. *See id.*

Several defendants also maintain that the court did not give them sufficient time to confer with their

counsel regarding peremptory challenges. Trial courts have ample discretion to determine the procedures under which peremptory challenges are exercised, *see United States v. Thompson,* 76 F.3d 442, 451 (2d Cir. 1996), and the district court repeatedly warned defense counsel that they would have a brief period at the end of jury selection in which to consult regarding their strikes. While other procedures were available to the district judge, and the approach she took was, conservatively stated, aggressive, defendants have not demonstrated that the court abused its discretion.

Nuculovic argues that his trial counsel was constitutionally ineffective because his counsel allegedly fell asleep at various points during the trial and failed to consult with Nuculovic and call witnesses on his behalf. Nuculovic's claim is best addressed on habeas review under 28 U.S.C. § 2255, rather than on direct review, so "that the allegedly ineffective attorney . . . [is] given the opportunity to explain the conduct at issue." *United States v. Khedr,* 343 F.3d 96, 100 (2d Cir. 2003). Consequently, we decline to address this claim now. *See Massaro v. United States,* 538 U.S. 500, 504 (2003).

Finally, several of the defendants raise challenges to the sufficiency of the evidence adduced to support their convictions. "[A] defendant raising an appellate challenge to the sufficiency of the evidence supporting a conviction faces a heavy burden, because we must review the evidence in the light most favorable to the government, drawing all reasonable inferences in its favor." *United States v. Gaskin,* 364 F.3d 438, 459

(2d Cir. 2004) (internal quotation marks omitted). We have repeatedly established that "[r]eversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." *Id.* at 459-60. After reviewing the substantial evidence of guilt the government adduced at trial, we conclude that the defendants have not met this heavy burden.

We have considered the defendants' remaining contentions and find them to be without merit. Accordingly, we affirm the judgment of the district court.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ _____

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of August, two thousand and nine,

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United States of America,

Appellee,

v.

Prenka Ivezaj, Nardino Colotti, Alex Rudaj, Angelo DiPietro, Nikola Dedaj, and Ljusa Nuculovic,

Defendants-Appellants.

ORDER

Nos. 06-3112-cr (L),
06-3275-cr (CON),
06-3296-cr (CON),
06-3339-cr (CON),
06-3372-cr (CON),
06-5908-cr (CON)

Appellant Prenka Ivezaj having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk